(2)

No. 90-1047

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,,
Respondents.

ON WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. CALDWELL (*Counsel of Record*)
KENNETH J. SCHNEIDER
ALBERT H. NEMAN
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
Telephone (513) 852-6031
Attorneys for Respondents

RONALD CULP, BOX 26, WORTHINGTON, OHIO 43085 (614) 846-7025

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a judgment upholding the constitutionality of a cinema admissions tax res judicata so as to bar a second action between the same parties challenging the same tax where the taxpayer advances a different constitutional ground in the second action?

2. Is a municipal admissions tax constitutionally imposed on cinemas when the result is to tax cinema admissions in the same manner as other retail transactions and there is substantial evidence that cinemas create an exceptional burden on municipal services?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

No. 90-1047

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,,
Respondents.

ON WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

On November 15, 1978, the Council of the City of Springdale, Ohio, enacted Ordinance No. 67-1978 imposing a 3% tax on the admission price to any cinema in the city. National Amusements, Inc., the petitioner, is the owner and operator of Showcase Cinema, one of the three multi-screen cinemas located in the City.

Although Springdale is a relatively small suburb of Cincinnati, by reason of its location at the intersection of two interstate highways, it is a major retail area with a regional shopping center and several smaller shopping centers.

Other than the three cinemas, the only other place of entertainment charging admission, in 1978 and now, is the Boulevard Night Club. It has existed in Springdale since approximately 1972. Pursuant to Chapter 113 of the Springdale Code of Ordinances, the Boulevard has paid an annual license tax of $1000.00 every year since opening.

On December 28, 1978, plaintiff filed an action against Springdale and Doyle H. Webster, Clerk, in the Court of Common Pleas of Hamilton County, Ohio, under Docket No. A7811145. The complaint demanded declaratory judgment and injunctive relief alleging the unconstitutionality of the Springdale cinema admissions tax. The allegations made in the 1978 litigation were identical to those set forth in the complaint filed herein with the exception that the 1978 complaint did not allege that there existed in Springdale any untaxed places of entertainment charging admission, nor did it allege a violation of the First Amendment under the U.S. Constitution.

On November 13, 1980 the trial court entered summary judgment in favor of Springdale and granting Springdale's counterclaim, declared the cinema admissions tax to be valid, lawful and enforceable.

The Court of Appeals, First Appellate District, affirmed the trial court's judgment under Docket No. 800842, (3 Ohio App. 3d 70, 1981) holding that a taxing authority may discriminate between trades and activities selected for taxation, providing the classification rests upon some difference having a reasonable relation to the object of the legislation. Judge Black, writing for the Court concluded:

> "In our judgment, the attraction of large masses of people who use cinemas can reasonably be conceived of as requiring such additional governmental services . . . that a tax designed to offset the cost thereof is substantially related to a governmental purpose. We find no denial of equal protection."

governmental purpose. We find no denial of equal protection."

The Ohio Supreme Court overruled a motion to certify (No. 82-42, February 17, 1982).

On July 10, 1984, National Amusements filed the present action making the same allegations as those alleged in the 1978 complaint and also alleging that the admissions tax violates National's First Amendment rights.

Thereafter the city enacted, effective October 1, 1984, Chapter 98 of its Code of Ordinances which imposed a tax of 3% on the admission price of all forms of entertainment other than cinemas. The Ordinance provided that the $1000.00 annual night club license tax would be applied as a credit against admissions taxes otherwise payable. During the year 1985 the Boulevard Night Club paid $77.00 in admissions tax and in 1986 similarly paid $38.00.

During the period between November 15, 1978, and October 1, 1984, National Amusements had collected and remitted to Springdale a total of $535,139.14 in tax. National's witnesses further testified that, based on its cost of borrowed funds, it had incurred interest expenses totaling $258,695.00 on the tax money thus remitted.

During the trial, Springdale presented substantial evidence demonstrating the financial burden imposed upon the city by the operation of the cinemas. Because of the fact that the cinemas attract great numbers of automobiles, all arriving at the same time, it was necessary to make various highway improvements to accommodate the traffic. These direct expenses amounted to approximately $48,000.00. In addition the city demonstrated a substantial amount of indirect expenses resulting from the operation of the cinemas. These indirect expenses consisting largely of additional fire and police protection were shown to approximate $500,000.00 per year.

The trial court found that, because the Boulevard Night Club was not taxed prior to October 1, 1984, the tax

The court therefore entered judgment against Springdale for the taxes collected of $535,139.14 plus interest as computed by National of $258,695.00. The court had previously held on summary judgment that after October 1, 1984 the tax was constitutional since it was being imposed on all places of entertainment charging admission.

The Court of Appeals for the First Appellate District reversed, entering final judgment for the city. The court held that the prior judgment was res judicata so as to bar this action; that the tax was not unconstitutional and the award of interest was unauthorized by state law.

National's motion to certify was granted by the Ohio Supreme Court. That court affirmed, holding that this action was barred by the doctrine of res judicata (53 Ohio St. 3d 60). In so holding, the court relied entirely upon Ohio law. Thereafter, on October 3, 1990 the court denied National's motion for rehearing.

REASON FOR DENYING CERTIORARI

This Court lacks jurisdiction because the judgment of the Ohio Supreme Court is supported by an adequate state ground and no federal question is therefore presented.

I. SUMMARY OF THE ARGUMENT

The Supreme Court of Ohio properly held that the prior judgment was res judicata so as to bar the present action which again challenges the constitutionality of the same tax. Since the decision rests upon an adequate state law ground, this Court lacks jurisdiction to review.

Res judicata prevents successive challenges to the constitutionality of an admissions tax notwithstanding the holding in *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984).

Where there is evidence that cinemas create an unusual burden on municipal services, cinema admissions may be constitutionally taxed in the same manner as other retail transactions even though other types of entertainment are left untaxed.

II. ARGUMENT

A. Res judicata is an adequate state law ground supporting the judgment of the court below and this Court therefore lacks jurisdiction.

It has long been the rule that, where the judgment of the state court rests upon an adequate state ground, this Court has no jurisdiction to review. As is pertinent to this action, the Court's jurisdiction is limited to cases presenting federal questions. Where an adequate state ground supports the state court judgment, this Court's opinion as to the federal question would be merely advisory and could not affect the outcome of the case. (*Fox Film Corporation v. Muller*, 296 US 207 (1935), *Utley v. St. Petersburg*, 292 US 106 (1934), *Wilson v. Loew's Inc.*, 355 US 597 (1958).

Petitioner has cited various cases, with some quotations, without any elaboration of the facts which would demonstrate any applicability to the present cause. The most serious failing in petitioner's argument is the failure to distinguish between cases where the state court judgment rested on a procedural rule and those where the judgment rested on substantive law. This Court articulated that distinction in *Henry v. Mississippi*, 379 US 443 (1965):

> "But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision and the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this court, we have no power to revise judgments on questions of state law. Thus the adequate non federal ground doctrine is necessary to avoid advisory opinion.
>
> These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."

This Court held in *Federated Department Stores. Inc. v. Moitie*, 452 US 394, that:

> "The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts."

Thus those cases cited by petitioner which involve state court decisions resting merely on procedural grounds have absolutely no application to the present cause. The application of the doctrine of res judicata cannot reasonably be construed to deprive the petitioner of a reasonable opportunity to assert First Amendment rights. Petitioner had that opportunity in the first action and no case holds that it is constitutionally entitled to a second opportunity.

It is of course, possible that a state court may apply a substantive ground in such a way as to deny due process. *Postal Telegraph Cable Co. v. Newport*, 247 US 464 (1918), is such an example. In that case the state court had held that the petitioner was barred from litigating the validity of its franchise by reason of a judgment rendered against its predecessor in title. However, the prior suit had been filed some two years after the predecessor had parted with the title and thus was not binding upon anyone in privity with the petitioner. Under those circumstances the application of the doctrine clearly violated due process. Obviously, no such situation exists in the present case. Both cases involved exactly the same parties and petitioner had a full opportunity to litigate its rights in the prior action. This Court also noted that res judicata is ordinarily a matter of state law.

The remainder of the cases cited by petitioner all involve situations where a party was precluded from asserting his federal right because of the application of a local procedural rule. None involve the situation where the state court decided the case on adequate state ground and therefore declined to reach the federal question. In those cases this Court has uniformly denied jurisdiction.

B. A judgment upholding the constitutionality of a cinema admissions tax is res judicata so as to preclude a later action between the same parties challenging the same tax, not withstand-

ing the taxpayer advances a different constitutional ground in the second action.

Even if this Court were free to determine questions of state law, there is no question that the decision of the court below is entirely consistent with its prior decisions. The Ohio Supreme Court has consistently rejected successive attacks on the constitutionality of the legislation even though different grounds are asserted. See *Cincinnati, ex rel. Crotty, v. City of Cincinnati*, 50 Ohio St. 2d 27 (1977), *Cincinnati v. Whitman*, 44 Ohio St. 2d 58 (1975), and *Canton v. Whitman*, 44 Ohio St. 2d 62 (1975).

While not seriously challenging that point, petitioner argues that the Ohio Supreme Court was bound to apply the federal law as to res judicata rather than state law, citing *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984). In that case this Court did examine the question whether the Ohio Supreme Court had decided the case under state law principles so as to insulate the case from review. This Court then examined the opinion of the court below and noted that the court had considered the matter in light of several decisions of this Court as well as under the Import\Export Clause of the U.S. Constitution. The Court therefore determined that the lower court decision had decided a question of federal law. There was however, absolutely no suggestion in that opinion that the state court was required to apply federal law as opposed to state law. Moreover, there is an important distinction in that the principal issue in the case was the effect of a prior decision of this Court rather than the prior decision of a state court.

Even if the Ohio Supreme Court had been required to consider the decision in *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984), the result would have been the same. That case involved the imposition of the Ohio Personal Property Tax on imported raw materials which were warehoused in their original packages. An earlier decision (*Hooven & Allison Co. v. Evatt*, 324 US 652 (1945), had held

that such taxation constituted a duty on imported goods in violation of the Import/Export Clause of the U.S. Constitution. In a later decision, *Michelin Tire Corp v. Wages,* 423 US 276 (1976), this Court abandoned the "original package" doctrine holding that imported goods were subject to a generally applicable state personal property tax.

This Court held that *Hooven & Allison Co. v. Evatt* was not res judicata because it involved different tax years. The basis of the decision is that in the case of an annual tax, such as a property tax, each year is a different tax and a different cause of action. The rates are fixed annually and the property subject to taxes is determined annually. The Springdale admissions tax is not an annual tax and the fact that payments are remitted quarterly does not change the character of the tax. It is instead an excise tax on a continuing activity and the years involved are of no significance. This Court further held that collateral estoppel would not apply since *Hooven & Allison Co. v. Evatt.* was based upon a now overruled decision. (*Low v. Austin*, 80 US 29, (1872)).

The earlier decision in this case is not based upon any overruled decision and in fact *Minneapolis Star and Tribune Company v. Minnesota*, 460 US 575 (1983), did not overrule any case or blaze any new trails. A virtually identical taxing scheme was struck down in *Grosjean v. American Press Co., Inc.*, 297 US 233 (1936). *Minneapolis Star* merely made it clear that a discriminatory tax imposed on only a few newspapers was unconstitutional regardless of legislative motive. Thus, res judicata remains a bar to this action.

The decision in *Limbach v. Hooven & Allison Co.*, was based largely on *Commissioner of Internal Revenue v. Sunnen*, 33 US 591 (1948), an income tax case. Sunnen owned various patents and had entered into a number of license agreements with his corporation authorizing their use in return for royalties. Sunnen assigned the agreements to his wife as a gift and the royalties were paid to the wife who

reported them as her income. Earlier litigation in 1935 had determined that the royalties were not taxable to Mr. Sunnen for the years 1929 to 31. This Court refused to apply res judicata, holding that each tax year is the origin of a new liability and a separate cause of action. Because of the intervening change in the tax law created by *Helvering v. Clifford*, 309 US 331 (1940), this Court also refused to apply the more limited principle of collateral estoppel.

In the case of income taxes it is essential that a tax year be established since it is impossible to determine whether a taxpayer has taxable income without calculation of the gross income and deductions occurring in a given year. In this respect the Ohio Personal Property Tax involved in *Limbach v. Hooven & Allison Co.* is similar in nature. An annual assessment date is essential in order to determine tax liability. The admissions tax involved here has none of these characteristics. There is no "tax year" and the taxes are a continuous obligation imposed as admissions are collected. The determination in the amount of tax due is in no way dependent upon the establishment of a "tax year." For that reason it is obvious that the prior judgment determined the constitutionality of tax for all future years and is therefore the same cause of action.

In order to bring itself within the rule of *Limbach v. Hooven & Allison*, petitioner must demonstrate first that the tax involves different "tax years" so as to constitute a different cause of action and, second, that there has been a complete repudiation of the constitutional analysis underlying the prior decision. Petitioner fails to meet either prong of the test. There is no tax year and the cause of action is identical. Secondly, the prior action does not rest upon any repudiated constitutional analysis.

The precise posture in the present case is that petitioner simply did not raise the First Amendment argument in the first case. Neither *Limbach v. Hooven & Allison* nor *Commissioner of Internal Revenue v. Sunnen* nor

any other decision grant petitioner the right to now make an argument that counsel did not think of in 1978.

There is another basic flaw in petitioner's argument. The cases on which it relies involve questions of whether some event or some property was legally taxable under the particular taxing law. Neither of these cases involved the constitutionality of the law itself. The only decision cited which actually involved the constitutionality of the state tax law was *Montana v. U.S.*, 440 US 147 (1979), and in that case this Court applied res judicata and denied relitigation of the question. We have found no reported decision permitting a given party to relitigate the constitutionality of any state law or municipal ordinance. If the rule were otherwise, it would be impossible to stop repeated and successive challenges to the constitutionality of any law.

C. A municipal admissions tax is constitutionally applied to cinemas when the result is to tax cinema admissions in the same manner as other retail transactions.

Petitioner relies principally on *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue*, 460 US 575 (1983), but the facts are clearly distinguishable. In that case the tax was a use tax on the cost of paper and ink products consumed by newspapers while no other type of business was subjected to a similar tax. By reason of exemptions only 14 out of 388 newspapers in the state were subject to the tax. Of course, the tax on the production of just a few of 388 newspapers, without any other justification, can be used effectively to censor the press and violates the First Amendment. Moreover, this Court held that, because newspapers were being subjected to a totally different type of tax, it was not practical to calculate the relative burden so as to determine whether actual discrimination existed.

In determining whether Springdale's admissions tax discriminates against cinemas, it is necessary to examine

the effect of the tax and this analysis requires an examination of Ohio's overall taxing structure. The basic question to be resolved under the *Minneapolis Star* analysis is whether cinemas are being taxed in the same manner as other retail businesses and at the same or lower rates. *Minneapolis Star* establishes that the motive of the legislature is immaterial in determining whether the tax discriminates. It is therefore the effect of the tax which is controlling and we cannot limit our inquiry to examination of Springdale's ordinance alone. The only relevant inquiry is to examine the combined effect of state and local taxation on cinemas and other retail businesses in Ohio.

While Ohio municipalities are granted home rule by Ohio Constitution, Article XVIII, Section 3, any taxing power is subject to statutory control (Ohio Constitution, Article XVIII, Section 13). Moreover, it has consistently been held that where the state imposes a given type of tax it preempts the field barring a municipality from levying a similar tax (See *Haefner v. City of Youngstown*, 147 Ohio St. 58, (1946)). This has the effect of avoiding double taxation and it also greatly restricts a municipality's taxing options.

Although there were earlier limited sales taxes, the comprehensive Ohio Sales Tax was enacted December 6, 1934, levying a tax of 3% on virtually all retail sales (115 Ohio Laws Pt. 2 V. 306). A 3% admissions tax was enacted on the same date (115 Ohio Laws Pt. 2 V. 342). Thus, the Ohio admissions tax became a part of the overall plan to tax all retail sales transactions at a rate of 3%. There is absolutely no question that under that tax structure cinemas were not being discriminated against and the admissions tax was clearly permissible under the *Minneapolis Star* analysis.

The Ohio admissions tax was repealed in 1947 (122 Ohio Laws 459) making this field of taxation available to municipalities, *Estelle Realty, Inc. v. Mayfield Heights*, 176 Ohio St. 367, (1964). Springdale, a political subdivision of

the state, has merely availed itself of the taxing option granted by the legislature. A cinema in Springdale is thus bearing exactly the same tax burden that it bore in 1947 with one exception. Its admissions are still being taxed at 3%, while other retail sales are being taxed at $5^1/_2$%.

The fact that Springdale is collecting the admissions tax while Ohio is collecting the sales tax does not create a discriminatory effect. Springdale is not singling out cinemas for differential treatment. Its ordinance merely places cinemas back into the Ohio taxing structure so that they are taxed on the same basis as other retail businesses. It should be noted that the Boulevard Night Club has always been subject to sales tax on its principal source of revenue - the sale of drinks.

Aside from the fact that only a few papers were taxed, the tax in *Minneapolis Star* was a use tax on paper and ink consumed while other businesses were taxed on retail sales. For this reason this Court held that the relative tax burden could not be compared so as to determine whether newspapers were taxed disproportionately. In the present case, cinemas have not been "singled out" for a different type of tax. They have been subjected to exactly the same type of tax as other retail businesses and at a lower rate. In the majority opinion, Justice O'Connor makes this distinction at page 590, n.13:

> "If a state employed the same method of taxation but applied a lower rate to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts."

The Springdale tax does not pose the threat involved in *Minneapolis Star*. Thus, if Springdale ever raised the admissions tax to a rate in excess of the sales tax, it would be easy for a court to detect the discrimination. Nor does the fact that Springdale initially overlooked the Boulevard Night Club in enacting its admissions tax change the result. As the statement of facts discloses, this omission involved only $77.00 in 1985 and $38.00 in 1986, since the Boulevard was already paying a substantial license fee. Considering the millions of dollars of retail sales and admissions taxes imposed on all retail transactions in Springdale, this omission can only be described as de minibus non curat lex.

Petitioner also cites *Festival Enterprises, Inc. v. City of Pleasant Hill*, 182 Cal. App 3d 960, (1986), but in that case the court stated a clearly distinguishing fact relative to the case at bar:

> "There is no contention that the additional revenue is needed because of the increased use of city services required by virtue of the operation of plaintiff's theaters, i.e. police protection, street repair or sanitation collection."

A similar holding was made in *United Artists Communications, Inc. v. City of Montclair*, 209 Cal. App. 3d 245 (1989), but there likewise was no evidence in this case of the burden which cinemas impose on municipal services. The tax in *United Artists* was 6% or the applicable sales tax rate "whichever is greater." The tax was thus discriminatory on its face. Neither case made the overall tax analysis contemplated by *Minneapolis Star* and thus neither is controlling here.

CONCLUSION

The decision of the Ohio Supreme Court is entirely consistent with its prior decisions on res judicata. Its judgment therefore rests upon an adequate state ground and there is thus no federal question which could be the basis for this Court's jurisdiction. Even if the Ohio Supreme Court was required to apply the prior decisions of this Court on the question of res judicata, the result would have been the same. The petition for certiorari should be denied.

Respectfully submitted,

DAVID A. CALDWELL (*Counsel of Record*)
KENNETH J. SCHNEIDER
ALBERT H. NEMAN
WOOD & LAMPING
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
(513) 852-6031
Attorneys for Respondents